Supreme Court, U.S.
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No. 85-1479

In The
Supreme Court of the United States
October Term, 1985

STONE & WEBSTER ENGINEERING CORPORATION,
Petitioner,

v.

DONALD LINDLEY and RITA LINDLEY,
Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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REASONS FOR GRANTING THE WRIT

I. INTRODUCTION.

The Ninth Circuit's decision in this case is a serious threat to the uniformity of procedure in the federal courts that the Federal Rules of Civil Procedure were adopted to bring about. Specifically, it threatens to introduce into the federal courts the variations that exist from state to state in "Doe" procedures and other state relation back rules. The danger is broader than that, however; the Ninth Circuit's rationale is applicable to virtually any procedure that can be described as "effectively" altering the basic result that follows from any substantive statute. It is hard to imagine any procedural rule that could not qualify for that rationale. Plaintiffs do not address that very good reason for granting a writ of certiorari.

Instead, plaintiffs argue chiefly that *Hanna v. Plumer*, 380 U.S. 460 (1965) does not require application of Rule 15(c) in this case, and that *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980) excuses its application, because "the *scope* of Rule 15(c)" is not broad enough to bring it into conflict with California "Doe" procedure. (Opp. at 2-3) Specifically, they say, "clearly Rule 15(c) was not intended to create a state limitations period by its clear meaning." (Opp. at 3) The difficulty with their argument is that Cal. Civ. Proc. Code sections 474 and 581a(a) do not "create a state limitations period" either. The "Doe" procedure is a relation back rule, just like Rule 15(c). As a result, *Hanna* governs this case and *Walker* does not, and the Ninth Circuit's decision is contrary to *Hanna* and the decisions of other circuits that have followed *Hanna*.

II. THE "SCOPE OF RULE 15(c)" IS THE SAME AS THAT OF THE CALIFORNIA "DOE" PROCEDURE; BOTH ARE RELATION BACK RULES.

Stone & Webster's Petition cited several decisions of the California Supreme Court and Court of Appeal explaining that the subject matter of the "Doe" procedure is relation back. (Pet. at 10-11) Plaintiffs themselves cite several more such cases. (Opp. at 4-5) In fact, they quote language from two of them that shows very clearly that the theory of the "Doe" procedure is one of relation back: a defendant substituted for a "Doe" previously listed in the complaint "is considered a party to the action from its commencement for the purposes of the statute of limitations." *Parrows v. American Motors Corp.*, 144 Cal. App. 3d 1, 7, 192 Cal. Rptr. 380, 382 (1983) (quoted at Opp. at 4); *Austin v. Massachusetts Bonding & Insurance Co.*, 56 Cal. 2d 596, 602, 15 Cal. Rptr. 817, 818, 364 P.2d 681, 682 (1961) (quoted at Opp. at 5).

That language is the exact description of the concept of relation back. And it cannot possibly be read as saying that the "Doe" procedure extends the limitations period. There would be no point in deeming a defendant substituted for a "Doe" to have been a party at the commencement of the lawsuit if the "Doe" procedure really extended the limitations period to encompass the time when he actually became a party by virtue of the substitution.

Literally dozens of California cases describe the "Doe" procedure in such relation back terms.* Plaintiffs refer to only one, *Munoz v. Furdy*, 91 Cal. App. 3d 942, 946, 154 Cal. Rptr. 472, 474 (1979), as saying that the time for naming a defendant "is extended" by the "Doe" procedure. Just a sentence later, however, the *Munoz* court explained what it really meant by the offhand characterization plaintiffs rely on:

> When the complaint is amended to substitute the true name of the defendant for the fictional name, *the defendant is regarded as a party from the commencement of the suit* . . . (emphasis added).

That is relation back again.

Contrary to all the California cases, including *Munoz*, the Ninth Circuit decided that the "Doe" procedure "does

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* E.g., *Marasco v. Wadsworth*, 21 Cal. 3d 82, 86, 145 Cal. Rptr. 843, 845, 578 P.2d 90, 92 (1978); *Smeltzley v. Nicholson Mfg. Co.*, 18 Cal. 3d 932, 935, 136 Cal. Rptr. 269, 271, 559 P.2d 624, 626 (1977); *Moseley v. Abrams*, 170 Cal. App. 3d 355, 360, 216 Cal. Rptr. 40, 43 (1985); *Kralow Co. v. Sully-Miller Contracting Co.*, 168 Cal. App. 3d 1029, 1035, 214 Cal. Rptr. 630, 634 (1985); *Olden v. Hatchell*, 154 Cal. App. 3d 1032, 1035, 201 Cal. Rptr. 715, 718 (1984); *Barrows v. American Motors Corp.*, 144 Cal. App. 3d 1, 7, 192 Cal. Rptr. 380, 382 (1983); *ITT Gilfillan, Inc. v. City of Los Angeles*, 136 Cal. App. 3d 581, 587, 185 Cal. Rptr. 848, 851 (1982); *Schumacher v. Superior Court*, 94 Cal. App. 3d 187, 191, 156 Cal. Rptr. 286, 288 (1979); *Coronet Mfg. Co. v. Superior Court*, 90 Cal. App. 3d 342, 345, 153 Cal. Rptr. 366, 367 (1979); *Chase v. State of California*, 67 Cal. App. 3d 808, 811, 136 Cal. Rptr. 833, 834 (1977); *Cooper v. Jevne*, 56 Cal. App. 3d 860, 873, 128 Cal. Rptr. 724, 731 (1976); *Jensen v. Royal Pools*, 48 Cal. App. 3d 717, 721, 121 Cal. Rptr. 805, 807 (1975); *Barnes v. Wilson*, 40 Cal. App. 3d 199, 203, 114 Cal. Rptr. 839, 842 (1974); *Warren v. Atchison, T. & S.F. Ry. Co.*, 19 Cal. App. 3d 24, 38, 96 Cal. Rptr. 317, 327 (1971); *Garrett v. Crown Coach Corp.*, 259 Cal. App. 2d 647, 649, 66 Cal. Rptr. 590, 592 (1968).

not deal with the 'relation back' doctrine at all but rather extends or tolls the limitations period." (App. A at A9) (quoting *Rumberg v. Weber Aircraft Corp.*, 424 F. Supp. 294, 300 (C.D. Cal. 1976)). Thus, ironically, the Ninth Circuit's purported deference to California law in this diversity case was based on completely disregarding what California had to say about its own laws and making up its own characterization. If a federal court is free to do that, and to displace federal rules with state procedures where it chooses to view them as "effectively" altering state substantive law results, the Federal Rules' goal of uniformity in procedure is in grave danger.

III. HANNA GOVERNS; WALKER DOES NOT.

Because the California "Doe" procedure and Rule 15(c) are both relation back rules, they are in "direct collision," *Hanna*, 380 U.S. at 472; in such a case *Hanna* provides the governing rule and *Walker* does not.

Walker's rule is that "*in the absence of a federal rule directly on point*, state service requirements *which are an integral part of the state statute of limitations* should control . . ." 446 U.S. at 752 (emphasis added). Here there is a rule directly on point on the subject of relation back, Rule 15(c). In addition, the "Doe" procedure for relation back is not an "integral part" of the California statute of limitations within *Walker's* meaning.

In *Walker* the state statute in question was a definition of what the statute of limitations meant by commencement of an action. The content of the limitations statute was inseparable from that definition; to disregard the definition was to change the statute of limitations itself.

But not every state provision related in some manner to a statute of limitations is such an "integral" part of it. *Hanna* also involved a statute of limitations. *See* 380 U.S. at 462 and n. 1. In fact, the Massachusetts requirement for in-hand service on an executor was part of *the same sentence* that stated the limitations period. *Ibid.* Yet *Hanna* held that the procedural manner-of-service aspect of the statute should be distinguished from its limitations aspect. *Ibid.* Though literally a part of the limitations statute, the in-hand service requirement was not an "integral" part, inseparable from the meaning of the limitations period as was the definitional statute in *Walker.*

Relation back rules like the California "Doe" procedure are undoubtedly related to the statute of limitations. But that does not make them "integral parts" of the limitations statutes. That is shown by the fact that they also have other functions unrelated to limitations. In California, the substitution of a named defendant for a "Doe" relates back for all purposes, not just for the purpose of the statute of limitations. For example, though the three-year period to serve summons under Cal. Civ. Proc. Code § 581a(a) normally starts to run when a party is first named, e.g., by amendment, it runs from the commencement of the action as to a party substituted for a "Doe", because the substitution relates back to that time. *Barrington v. A.H. Robins, Co.*, 39 Cal. 3d 146, 152-54, 216 Cal. Rptr. 405, 408-409, 702 P.2d 563, 566-67 (1985). Similarly, though the normal rule on a motion for change of venue is that residence for purposes of venue is to be determined by the pleadings as of the time when the motion is filed, the court must nevertheless consider the residence of a party who is substituted for a "Doe" between the filing of the

motion and the hearing, because the substitution relates back to a time before the motion was brought. *Gutierrez v. Superior Court*, 243 Cal. App. 2d 710, 724-25, 52 Cal. Rptr. 592, 602 (1966). It is impossible to explain how an "integral" part of the statute of limitations could operate in those ways outside of the limitations context.

Because there is a federal rule directly on point, and because the California "Doe" procedure is not an integral part of the statute of limitations, *Walker* does not govern this case. *Hanna* does, and it commands application of Rule 15(c).*

IV. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF OTHER CIRCUITS.

In its Petition, Stone & Webster cited a number of federal court cases applying Rule 15(c) under *Hanna* in a way in conflict with the Ninth Circuit's decision. (Pet. at 13-14) Plaintiffs' purported distinctions of those cases (Opp. at 6-7) fail to see the forest for the trees. Certainly the state rules involved in those cases differed in various respects from California's "Doe" procedure, as plaintiffs point out. But all of the state rules involved dealt with

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* Plaintiffs' observation that they filed their complaint in state court (Opp. at 3) does not give them a right to application of state procedures. The same thing could be said of any state procedure in any removed action.

Plaintiffs' suggestion that application of Rule 15(c) will encourage defendants to forum shop (Opp. at 4) is ridiculous. Could the defendants who removed this action before Stone & Webster was added possibly have been influenced in the slightest way by the chance that removal might make it more difficult for plaintiffs to maintain their action against additional defendants such as Stone & Webster, added after removal? Surely not.

relation back. And all of the cases concluded that Rule 15(c), not the state relation back rule, governed that subject. All of them conflict with the Ninth Circuit's notion that relation back rules should be regarded as integral parts of the statute of limitations because they can be characterized as "effectively extending" the limitations period.

In particular, plaintiffs' attempt to distinguish the cases Stone & Webster cited on the ground that they involved "procedural" rules is both wrong and irrelevant. It is wrong because it depends on the same false notion that California's "Doe" procedure is "substantive" because it can be viewed as "effectively extending" the limitations period. It is irrelevant because, under *Hanna,* the only significance of classifying a matter as "procedural" is to deem it a permissible subject for a rule under the Rules Enabling Act, 28 U.S.C. § 2072, forbidding modification of any substantive right by rule, and under the Constitutional provision for a federal court system. *See Hanna,* 380 U.S. at 463-64, 471-72. But the adoption of Rule 15(c) evidences the judgment of the Advisory Committee, this Court, and Congress that relation back is a proper subject of a federal rule under those provisions. *Hanna,* 380 U.S. at 471. Not even plaintiffs question Rule 15(c)'s validity. And the Ninth Circuit has concluded that Rule 15(c) does not transgress either the Rules Enabling Act's proscription or the Constitution. *Santana v. Holiday Inns, Inc.*, 686 F.2d 736, 740 (9th Cir. 1982).

Hanna commands the federal courts to apply a valid federal rule in diversity cases. Other circuits have obeyed that directive. The Ninth Circuit has not, and its decision is contrary to those decisions.

CONCLUSION

The Court should review this case to settle the conflict between the Ninth Circuit's decision in this case, on one hand, and on the other, *Hanna* and the lower federal court cases that have correctly applied it in the context of Rule 15(c). It should also review it because the Ninth Circuit's decision poses a serious threat to the Federal Rules' goal of uniform procedure, both because of its result and because of its rationale. A writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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